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# **Inducing Breach of Contract: A Comparison of the Laws of the United States, France, The Federal Republic of Germany and Switzerland**

by *Peter H. Eulau*\*

## **I. INTRODUCTION**

In recent years, inducing breach of contract has become the topic of increasing legal comment not only in the United States but also in Europe. It is remarkable that in Germany, in particular, several theories were created with the goal of changing a more or less constant line of judicial opinion. It was not the decisions themselves so much as the reasoning behind them which became the subject of critical consideration. In France and the United States generally, no such tendencies can be found. Neither the reasoning of the courts nor the opinions of the different commentators have generally tried to change rules and concepts which have been followed for many years. Only a small number of decisions on inducing breach of contract has been handed down in Switzerland, perhaps due to potential plaintiffs' fears of losing their cases as the Swiss courts more cautiously define a tort with regard to the inducer's acting than do the courts in the United States, in France, or, in some respects, in Germany. Moreover, the losing party must bear both its own and its opponent's costs as well as the court costs. The number of Swiss publications on this subject is also very small.

France, Germany and Switzerland offer different approaches and solutions to the problem of inducing breach of contract. The American *solution* has

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something in common with that of France, though these two countries have completely different legal systems. It is the author's intention to present not only the various solutions, although a description of the solutions in each of those four countries will be necessary, but also to discuss the underlying legal concepts which lead to the different solutions.

In a general sense, liability of the inducer for damages caused to one contractual party (hereinafter referred to as the Creditor) is the rule in the common law countries and in France; in Germany and Switzerland, however, liability is dependent upon various specific conditions such as the manner of the inducement or the nature of the violated contract itself.

This discussion is limited to problems connected with inducing breach of contractual obligations in the intrinsic sense. Cases of alienation of a spouse's affection, for example, or of inducing breach of a marriage settlement will be excluded from the discussion.

This article considers cases where a person (hereinafter referred to as the Debtor) breaches a contract at the instigation of a third party, not those where a third person interferes in another way by doing some act which makes performance more burdensome or impossible or renders it of less value to the Creditor. For example, the cases of an assignor who accepts payment from his debtor who did not know of the assignment and who is, therefore, acting *bona fide*, or of an unauthorized holder of bearer instruments who cashes the instruments will not be discussed here, nor will cases where a third person affects an owed object either by destroying, damaging, withholding or concealing it, or where a third person commits a tort against another person by violating his personal integrity so that the other person is unable to accomplish the conditions of the contract. Also excluded are cases where acts of third persons cause only a conflict of claims, rather than a breach of contract.<sup>1</sup>

To determine if and when a third person, a nonparty to an existing contractual relationship, can be sued by the Creditor of the contract, it is necessary to begin by recognizing one of the most fundamental principles of the law of contracts, *privity of contract*, under which only one party can demand from its opponent the accomplishment of its claim and, similarly, only the opponent can be forced to fulfill its duty. The interest of one party is thereby directed to the integrity of its contractual relationship with the other,<sup>2</sup> and may involve interests in commercial expectancies. On the other hand, one must remember that the third person has an interest in keeping his own freedom of individual action, a part of which is freedom of contract in the sense of freely choosing contractual

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1. There is a conflict of claims when the realization of one of several concurring claims would vitiate the others. See N. ZACHMANN, *DIE KOLLISION VON FORDERUNGRECHTEN* 1 (1976) (and cases cited therein).

2. "It is of the highest social importance to preserve the integrity of contractual relations." 1 F. HARPER & F. JAMES, *THE LAW OF TORTS* 490 (1956) [hereinafter cited as HARPER & JAMES].

partners as well as forming the contract and its contents. The extent to which the law protects each interest vis-a-vis the other is the result of a weighing and balancing process.<sup>3</sup> Thereupon may depend, not solely but decisively, the legitimacy of holding the third person liable. In any case, the Creditor will often find advantage in suing the third person, the outsider, who induced the Debtor to breach the contract; the Debtor might not be found or might not be subject to the jurisdiction of the court, or the inducer might be financially more able to pay damages than the breaching party.<sup>4</sup> Often only the inducer is able to give restitution to the victim of the breach. Moreover, even if an action against the Debtor is available to the Creditor, the inducer would still have no defense insofar as both he and the Debtor are wrongdoers; each would be liable for the loss.<sup>5</sup>

## II. HISTORICAL SURVEY

The roots of precedents on inducing breach of contract, a special category of interference with contractual relations, reach back to the Roman law concepts of the *manus* and *patria potestas*. These consisted of the husband and father's right of "community of life": when the wife was withheld from the husband by a third person, the husband had the redress of the *interdictum de uxore exhibenda ac ducenda*, even where the third person was the wife's father.<sup>6</sup> A similar redress was available to the *paterfamilias* when a third person took possession of his child.<sup>7</sup>

3. See Sayre, *Inducing Breach of Contract*, 36 HARV. L. REV. 663, 687 (1922-1923) [hereinafter cited as Sayre]:

The law can undertake to restrain everyone from committing acts of violence without seriously impairing the general freedom of action; it cannot thus undertake to restrain everyone from committing otherwise lawful acts which may result in causing people to break their contract, without sacrificing that very freedom of individual action which the common law exists largely to secure.

See also RESTATEMENT (SECOND) OF TORTS § 766, Comment c, at 39 (Tent. Draft No. 14, 1969) [hereinafter cited as Draft 14].

4. See H. VYGEN, *DIE VERLEITUNG ZUM VERTRAGSBRUCH IM ANGLO-AMERIKANISCHEN UND DEUTSCHEN RECHT (EINE RECHTSVERGLEICHENDE UNTERSUCHUNG)* 2 (1970) [hereinafter cited as VYGEN].

5. *Phillips & Benjamin Co. v. Ratner*, 206 F.2d 372 (2d Cir. 1953); *Horn v. Seth*, 201 Md. 589, 95 A.2d 312 (1953); *Hornstein v. Podwitz*, 254 N.Y. 443, 173 N.E. 674 (1930). Some older cases have held to the contrary: *Chambers v. Baldwin*, 91 Ky. 121, 15 S.W. 57 (1891); *Glencoe Sand & Gravel Co. v. Hudson Bros. Comm'n Co.*, 138 Mo. 439, 40 S.W. 93 (1897); *Swain v. Johnson*, 151 N.C. 93, 65 S.E. 619 (1909). See W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 948 (4th ed. 1971) [hereinafter cited as PROSSER]; Draft 14, *supra* note 3, § 766, Comment u., at 49. This principle is also recognized in Switzerland, France and Germany.

6. DIGEST 43.30.2 (Hermogenianus): "*Immo magis de uxore exhibenda ac ducenda pater, etiam qui filiam in potestate habet, a marito recte convenitur.*"

7. *Filii vindictio*, in later times: *interdictum de liberis exhibendis* or *interdictum de liberis ducendis*. The instances of the Roman law cited by Sayre, *supra* note 3, and by 1 HARPER & JAMES, *supra* note 2, at 491, should be considered the historical background of cases of interference with existing relations in general, rather than specifically those of inducing breach of contract.

Another source can be found in premedieval German law. When the bride's clan did not agree to the marriage, the groom could make the bride his wife by "kidnapping" her (with her consent, of course). With the marriage, the wife lost the membership of her clan and, importantly, the husband had to pay an atonement to that clan.<sup>8</sup>

These ancient conceptions of protection of the "family's head" — and, thus, in some measure of the family itself — against interferences by outsiders found its expression in statutes in England as well as in some Continental countries, but it was no longer the husband or father who was to be protected. The protection of the employer or master against enticement of his servant or laborer came to be the subject of the doctrine. In 1349, as a consequence of the death of laborers in the Great Plague, the Ordinance of Labourers was enacted.<sup>9</sup> A system of compulsory labor was introduced under which every able-bodied man and woman under sixty years "not living in merchandize, nor exercising any craft, nor having of his own whereof he may live, nor proper land" was compelled to serve "him which so shall him require" at the wages as fixed by law at the pre-Plague level.<sup>10</sup> To prevent servants from running away, the Ordinance provided in Chapter Two:

If any reaper, mover, or other workman or servant, of what estate or condition that he be, retained in any man's service, do depart from the said service without reasonable cause or license, before the term agreed, he shall have pain of imprisonment. And that none under the same pain presume to receive or to retain any such in his service.<sup>11</sup>

Thus, this provision addressed two different parties: the reaper, mover or other workman or servant as the person engaged in a performance, and the "third person," the outsider, who presumed to *receive* or *retain* any such person who was already bound to another. Only the second category is important to this article. It is noteworthy that the statute forbade the exploitation of the servant's breach of contract whether combined with an inducement or not.<sup>12</sup> The statutory action was action of trespass, similar to the older action for physical violence against servants. Later, the two actions were absorbed in the action on the case.<sup>13</sup>

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8. See H. PLANITZ & K.A. ECKHARDT, *DEUTSCHE RECHTSGESCHICHTE* 54 (3d ed. 1971). The wife's clan could also use its right of private warfare. See R. SCHROEDER & E.V. KUENSSBERG, *LEHRBUCH DER DEUTSCHEN RECHTSGESCHICHTE* 74 n.57 (7th ed. 1932). Atonement is not to be mistaken for the price which the husband had to pay for buying his wife in the so-called contractual marriage, the regular form of marriage. See *id.* at 75, 75 n.60.

9. 23 Edw. 3.

10. See Sayre, *supra* note 3, at 665.

11. See note 9 *supra*, c.2.

12. There are somewhat similar provisions in labor statutes at the present time without, however, punishment. Cf. *GEWERBEORDNUNG FÜR DAS DEUTSCHE REICH* (The Ordinance of the German Empire on Trade) [GeWO] § 125; C. TRAV. (French Labor Code) art. L. 122-15 (Fr.).

13. See PROSSER, *supra* note 5, at 928-29; 1 HARPER & JAMES, *supra* note 2, at 491; Sayre, *supra* note 3.

The ancient German law also made enticement of servants to quit their employment a crime. The servant as well as the enticer had to pay the authorities a heavy fine. Moreover, an important difference from the English Ordinance of Labourers was that the principal could file a suit for compensation against the enticer.<sup>14</sup> These rules were later adopted by the so-called Common German Civil Law.<sup>15</sup> Statutes on the European Continent prohibited not only the enticement of servants but included also provisions concerning a third person's liability for inducing a seller to breach his contract with a buyer and to sell the goods to the third person (the second buyer). For example, under Title VIII of the Ordinance of the City Court of Basle (*Basler Stadtgerichtsordnung*) of 1719, the first buyer had a claim against the inducer, if the latter acted in bad faith, for surrender of the goods. In addition, the inducer was punished for his act.<sup>16</sup>

The Napoleonic Code had a similar provision:

Si la chose qu'on s'est obligé de donner ou de livrer à deux personnes successivement, est purement mobilière, celle des deux qui en a été mise en possession réelle est préférée et en demeure propriétaire, encore que son titre soit postérieur en date, pourvu toutefois que la possession soit de bonne foi.<sup>17</sup>

Neither the Napoleonic Code nor the Prussian Civil Code (the so-called Prussian Common Law) limited the Creditor's protection against inducement to breach a contract to the cases mentioned above. Since both codes protected all assets, including real and personal property as well as contractual rights, by ordaining compensation for every illicit and culpable detriment,<sup>18</sup> the Creditor had a claim against a third person in any case of inducing breach of contract.<sup>19</sup> Thus, by the end of the 18th Century, development in civil law countries of liability for inducing breach of contract was ahead of that in common law ones.

A *caesura* and a start of a new development was the case of *Lumley v. Gye*,<sup>20</sup>

14. See VYGEN, *supra* note 4, at 71; D. REHBEIN, DIE VERLETZUNG VON FORDERUNGSRECHTEN DURCH DRITTE 4 (1968) [hereinafter cited as REHBEIN]; Fischer, *Die Verletzung des Gläubigerrechts als unerlaubte Handlung*, in 12 ABHANDLUNGEN ZUM PRIVATRECHT UND CIVILPROZESS DES DEUTSCHEN REICHES 38 (O.C. Fischer ed. 1905).

15. *Id.*

16. Other examples can be found in J. BRUNNEMANN, COMMENTARIUS IN CODICEM JUSTINIANEUM (1608-1672), further in [1756] Code Maximilaneus bavaricus civilis, Statute IV, 4 § 9; cf. ALLGEMEINES LANDRECHT FUER DIE PREUSSISCHEN STAATEN (The Prussian Civil Code) [ALR] I 10 §§ 23, 25.

17. "If a thing which a person has undertaken to give or to deliver to two persons consecutively is purely personal property, the one of the two who has been placed in actual possession is preferred and remains the owner, even should his title be subsequent as to date, provided however he possesses in good faith." CODE NAPOLEON art. 1141 (H. Cachard trans.).

18. See *id.* arts. 1382 & 1383 (currently the French Civil Code), and ALR I 6 §§ 10 *et seq.*

19. See VYGEN, *supra* note 4, at 71 *et seq.*

20. [1853] 2 El. & Bl. 216, 118 Eng. Rep. 749.

decided in 1853. Miss Johanna Wagner, an opera singer, had contracted with the plaintiff to perform in his theatre, exclusively, for a certain time. The defendant, "knowing the premises, and maliciously intending to injure plaintiff as lessee and manager of the theatre, enticed and procured" Johanna Wagner to refuse to carry out her contract. Although an opera singer could not be considered a "workman or servant" within the meaning of the Ordinance of Labourers, the court held that the principle of the statute should be extended to this case, and that it was a tort to induce her to break the engagement.<sup>21</sup>

For a time it was not clear whether the rule stated by a discordant court would be generally accepted. Finally, about thirty years later, the English Court of Appeals declared that the doctrine was to be adopted as an undisputed part of English law.<sup>22</sup> In 1893, the principle of *Lumley v. Gye* was extended to cases of inducing breach of contract other than those for personal service.<sup>23</sup> In *Quinn v. Leathem*,<sup>24</sup> Lord MacNaughten spelled out the general rule that "it is a violation of legal right to interfere with contractual relations recognised by law, if there be no sufficient justification for the interference."<sup>25</sup>

The legal development in England has been significant for the legal development in the United States as well as in the other common law countries. The rule stated in the leading case of *Lumley v. Gye* was generally ac-

21. Justice Erle stated:

[T]he answer appears to me to be, that the class of cases referred to rests upon the principle that the procurement of the violation of the right is a cause of action, and that, when this principle is applied to a violation of a right arising upon a contract of hiring, the nature of the service contracted for is immaterial. It is clear that the procurement of the violation of a right is a cause of action in all instances where the violation is an actionable wrong. . . : he who procures the wrong is a joint wrong-doer.

[1853] 2 El. & Bl. at 232, 118 Eng. Rep. at 755. In his dissenting opinion, Justice Coleridge mentioned that the remedy for breach of contract is by the general rule of the law confined to the contracting parties. *Id.* at 246, 118 Eng. Rep. at 760. (Justice Coleridge focused on the principle of the privity of contract). He continued:

I need not argue that, if there be any remedy by action against a stranger, it must be by action on the case. . . . Unless there be a loss thus directly and proximately connected with the act, the mere intention, or even the endeavor to produce it will not found the action. The existence of the intention, that is the malice, will in some cases be an essential ingredient in order to constitute the wrongfulness or injurious nature of the act; but it will neither supply the want of the act itself, or its hurtful consequence.

*Id.* Justice Coleridge also noted the impossibility of drawing "a line between advice, persuasion, enticement and procurement." *Id.* Finally, he interpreted the Ordinance of Labourers in a strict sense: looking at the words and the language of the preamble of the Ordinance, "it is clear that mechanics and labourers in husbandry were the principle objects of the statute." *Id.* But Justice Coleridge could not convince the other judges, and judgment was for the plaintiff. According to Draft 14, *supra* note 3, § 766, Comment c, at 38, lies the significance of *Lumley v. Gye* "in its extension of the rule of liability to nontortious methods of inducement."

22. *Bowen v. Hall*, [1881] 6 Q.B.D. 333.

23. *Temperton v. Russell*, [1893] 1 Q.B. 715.

24. [1901] K.B. 495.

25. *Id.* at 510.

cepted; early decisions, especially of the American courts, that refused to extend the principle beyond contracts of employment<sup>26</sup> have been overruled.<sup>27</sup>

### III. SOLUTIONS IN THE DIFFERENT COUNTRIES

Before examining the underlying concepts which have led to different solutions in the different countries, a survey of these solutions should be made.<sup>28</sup>

#### A. *United States*

After the principle of *Lumley v. Gye* was adopted in the United States,<sup>29</sup> it was held "that the sanctity of the existing contract relation takes precedence over any interest in unrestricted competition. . . ."<sup>30</sup> This principle found application especially in cases of offers of advantageous terms to induce violation of exclusive agency agreements and in cases of purchase of goods in disregard of contracts limiting their resale. Thus, a third person who induced on contracting party to break the contract became liable to the other contracting party.

In Draft 14 the Council of the American Law Institute proposes that

[o]ne who intentionally induces or otherwise intentionally causes a third person not to perform a contract with another, other than a contract to marry, is subject to liability to the other for pecuniary loss resulting from the breach of contract.<sup>31</sup>

26. *E.g.*, *Glencoe Sand & Gravel Co. v. Hudson Bros. Comm'n Co.*, 138 Mo. 439, 40 S.W. 93 (1897); *cf.* 1 HARPER & JAMES, *supra* note 2, at 493-94; Harper, *Interference with Contractual Relations*, 47 NW. U. L. REV. 877 (1952-53) [hereinafter cited as Harper]. See also RESTATEMENT OF TORTS § 766; Draft 14, *supra* note 3, § 766, Comment d, at 40; Sayre, *supra* note 3, at 671; PROSSER, *supra* note 5, at 930; *Boyson v. Thorn*, 98 Cal. 578, 33 P. 492 (1893); *Ashley v. Dixon*, 48 N.Y. 430 (1872).

27. See PROSSER, *supra* note 5, at 930; *Imperial Ice Co. v. Rossier*, 18 Cal.2d 33, 112 P.2d 631 (1941).

28. For a more perceptive description, see the commentators cited below.

29. See, *e.g.*, *Angle v. Chicago, St. P., M. & O.R.*, 151 U.S. 1 (1894); *Meason v. Ralston Purina Co.*, 56 Ariz. 291, 107 P.2d 244 (1940); *Rullsell v. Bovard*, 153 Kan. 729, 113 P.2d 1064 (1941); *Beckman v. Marsters*, 195 Mass. 205, 80 N.E. 817 (1907); *Sumwalt Ice & Coal Co. v. Knickerbocker Ice Co.*, 114 Md. 403, 80 A. 48 (1908); *Wilkinson v. Powe*, 300 Mich. 275, 1 N.W.2d 539 (1942); *Joyce v. Great N.R.*, 100 Minn. 225, 110 N.W. 975 (1907); *Schechter v. Friedman*, 141 N.J.Eq. 318, 57 A.2d 251 (1948); *Hornstein v. Podwitz*, 254 N.Y. 443, 173 N.E. 674 (1931); *Campbell v. Gates*, 236 N.Y. 457, 141 N.E. 914 (1923); *Winston v. Williams Lumber Co.*, 227 N.C. 339, 42 S.E.2d 218 (1947); *Haskins v. Royster*, 70 N.C. 601 (1874); *Chilton v. Oklahoma Tire Co.*, 180 Okla. 29, 67 P.2d 27 (1937); *Bliss v. Holmes*, 156 Okla. 40, 9 P.2d 718 (1932); *Sears v. International Bhd. of Teamsters*, 8 Wash.2d 447, 112 P.2d 850 (1941); *Husting v. Coca Cola Co.*, 205 Wis. 356, 238 N.W. 626 (1931).

30. PROSSER, *supra* note 5, at 945.

31. Draft 14, *supra* note 3, § 766. The corresponding section of the original Restatement reads: "Except as stated in Section 698, one who, without a privilege to do so, induces or otherwise purposely causes a third person not to (a) perform a contract with another, or (b) enter into or continue a business relation with another, is liable to the other for the harm caused thereby." RESTATEMENT OF TORTS § 766. Because the defendant's privileges may differ, the Council of the American Law Institute treats these in a separate section now, *i.e.*, in §§ 767 *et seq.* See Draft 14, *supra* note 3, (Note to Institute no. 3 at 30). Since Draft 14 clearly reflects the case law, it is useful to refer to the Draft.



The Comment states that one "may not, without justification, intentionally frustrate dealings that have been reduced to the form of a contract."<sup>32</sup>

The liability of the inducer is not always limited to the loss as such. For example, Tennessee makes it more serious to persuade someone to violate a contract than to violate his own. The person who induces any party to break the contract "shall be liable in treble the amount of damages resulting from or incident to the breach of [the] contract."<sup>33</sup>

No difficulties have arisen over whether the same rules are applicable if the violated contract is voidable. It is generally held that it makes no difference to the *external* relationship, that between the Creditor and the third party who is inducing the breach, whether the contract is valid or only voidable.<sup>34</sup> The important question is whether the particular contract was in force at the moment of the inducement for there is no liability for inducing breach of a contract if the contract was void in fact at that time, rather than merely voidable.<sup>35</sup> Illustrations hereto are the so-called "yellow dog" contracts by which employees agree with their employers not to join labor unions.<sup>36</sup> As these contracts are made unenforceable by federal and much state legislation,<sup>37</sup> inducing breach of such a clause does not render the inducer liable. Moreover, if a contract is terminable at will, this should deny the Creditor an action against the person who had induced the Debtor to terminate the contractual relationship. Sayre stated concisely: "The doctrine growing out of *Lumley v. Gye* cannot be extended to cases where no contract was broken."<sup>38</sup> The Creditor has in such a case no right to have the contract with the Debtor continued. He has only an expectancy which is comparable with the expectancy of a businessman

32. Draft 14, *supra* note 3, § 766, Comment b, at 37. The text continues: "There is no general duty to do business with all who offer their services, wares or patronage; but there is a general duty not to interfere intentionally with another's reasonable business expectancies of trade with third persons, whether or not they are secured by contract, unless the interference is privileged under the circumstances." *Id.* § 766.

33. TENN. CODE ANN. § 47-15-113 (1964).

34. The Supreme Court of Oregon stated with respect to a contract which was unenforceable due to the Statute of Frauds: "The statute of frauds is enacted for the protection of persons sought to be charged [on the contract]. It is personal and not available to strangers." *Ringler v. Ruby*, 117 Or. 455, 460, 244 P. 509 (1926).

35. See PROSSER, *supra* note 5, at 932; 1 HARPER & JAMES, *supra* note 2, at 495-96; Harper, *supra* note 26, at 879. Draft 14, *supra* note 3, § 766, Comment f, at 40-41 states:

It is not, however, necessary that [the agreement] be legally enforceable against the [Debtor]. A promise may be valid and subsisting contract even though it is voidable. . . . The [Debtor] may have a defense against action on the contract, which would permit him to avoid it and escape liability on it if he sees fit to do so. Until he does, the contract is a valid and subsisting relation, with which the actor is not permitted, without justification, to interfere.

*Contra*, *Little v. Children*, 12 S.W.2d 648 (Tex.Civ.App. 1928).

36. *E.g.*, *Exchange Bakery & Rest. Co. v. Rifkin*, 245 N.Y. 260, 157 N.E. 130 (1927).

37. See PROSSER, *supra* note 5, at 931.

38. Note 3 *supra*, at 701-02.

that his customer will continue to do business with him;<sup>39</sup> the interest of a competitor in the free opportunity to acquire the business for himself must prevail over the interest of the Creditor in continuing the contractual relationship.<sup>40</sup>

At the present time, generally, no limitation confines the Creditor's action to cases where the inducer used some illegal or unfair means, such as fraud, intimidation or secondary boycott.<sup>41</sup> It is sufficient that the inducement was intended. The Restatement of Torts<sup>42</sup> adopts the position that while intentionally causing the breach of contract is necessary and sufficient, it is not essential that the intent to cause the breach

be the actor's sole or paramount purpose. It is sufficient that he designs this result whether because he desires it is an end in itself or because he regards it as necessary, even if regrettable, means to some other end.<sup>43</sup>

However, contrary is the view of Sayre who distinguishes between "procuring" or "inducing" breach of contract on one hand and "causing" it on the other. A breach is merely caused, not procured,

when it occurs only as an incidental and undesired, though it may be clearly foreseen and inevitable, by-product in the seeking of some quite different object, unconnected with the object which led to the making of the contract.<sup>44</sup>

39. See PROSSER, *supra* note 5, at 946.

40. Prosser mentions a "privilege of competition which extends to inducing the termination of agreements terminable at will, whether they concern employment or other relations." *Id. Cf.*, Vincent Horwitz Co. v. Copper, 352 Pa. 7, 41 A.2d 870 (1945); Kingsbery v. Phillips Petroleum Co., 315 S.W.2d 561 (Tex.Civ.App. 1958). For an interference with a contract terminable at will to be actionable, other elements and factors must be present. See Jensch, *Interference*, 38 TUL. L. REV. 458 (1963-1964). The Draft 14 seems to go in the other direction, stating that until the Debtor has terminated the agreement, "the contract is valid and subsisting, and the defendant may not, without justification, interfere with it. The fact that the contract is terminable at will is, however, to be taken into account in determining the damages which the plaintiff has suffered by reason of its breach." Note 3 *supra*, § 766, Comment g, at 41. See also, Chambers v. Probst, 145 Ky. 381, 140 S.W. 572 (1911), and cases cited therein.

41. See Daly v. Cornwell, 34 App.Div. 27, 54 N.Y.S. 107 (1898); DeJong v. B.G. Behrman Co., 148 App.Div. 37, 131 N.Y.S. 1083 (1911); see also, Sayre, *supra* note 3, at 674. Louisiana, however, focuses on the means used. It is held that the inducer does not commit a tort unless means are used which are unlawful in themselves. See Robert Heard Hale, Inc. v. Gaiennie, 102 So.2d 324 (La.App. 1958); Cust v. Item Co., 200 La. 515, 8 So.2d 361 (1942); PROSSER, *supra* note 5, at 930. This solution in the "Napoleonic Code State" is interesting because the French courts generally do not consider the means used by the inducer as significant for classifying his conduct as unlawful.

42. § 766, Comment f, at 40. The Draft 14, *supra* note 3, § 766, Comment k, at 44, as well as PROSSER *supra* note 5, at 936, have broadened this theory to encompass other kinds of interference with a contract: "There is no technical requirement as to the kind of conduct that may result in interference with the contract. It may be any conduct which conveys to the [Debtor] the actor's desire to influence him not to deal with the other." Draft 14, *supra* note 3, § 766, Comment k, at 44.

43. Draft 14, *supra* note 3, § 766, Comment h, at 42. See, e.g., 1 HARPER & JAMES, *supra* note 2, at 497, 498.

44. Sayre, *supra* note 3, at 678.

For Sayre, in contrast to Harper and James and the authors of Draft 14, it is the purpose, and not only the intent, that makes the actor liable.<sup>45</sup> However, the distinction between the two opinions is not as significant as it might seem. Harper and James<sup>46</sup> and Draft 14<sup>47</sup> suggest that, if the interference with the Creditor's contract was incidental in character, the question of privilege for the interference becomes especially important. This corrective to the stricter theory is also supported by Prosser.<sup>48</sup> As the cases show, the courts have paid attention to the question as to whether the third person acted with the purpose of interfering with the contract only where the actor interfered with contractual relations without having induced a breach. There, the courts have followed both theories.<sup>49</sup>

The inducer must have had knowledge of the existence of the contract or, at least, of facts from which the existence of the contract can generally and reasonably be inferred.<sup>50</sup> This principle is perhaps justified as far as the actor's *liability* is concerned,<sup>51</sup> but in the author's view not if one speaks of inducing as such. For inducement, it is only relevant that the third person provoked the Debtor's decision to commit the concrete violation of the contract. The notion of "inducing," as different from the third person's liability, is solely a problem of causation,<sup>52</sup> and not of intent or negligence.

The presence or absence of ill will or other motives may be important, in another context, for determining if the inducer's conduct was privileged.<sup>53</sup> In

45. The rules "apply also to intentional interference, . . . in which the defendant does not act for the purpose of interfering with the contract, or desire it, but he knows that such interference is certain, or substantially certain to occur as a result of his acts. They apply, in other words, to interferences which are incidental to the actor's independent purpose and desire, but are known to him to be necessary consequences of his acts." Draft 14, *supra* note 3, § 766, Comment j, at 43.

46. Note 3 *supra*, at 498.

47. Note 3 *supra*, § 766, Comment j, at 43.

48. Note 5 *supra*, at 942. The idea was also mentioned by Carpenter, *Interference*, 41 HARV. L. REV. 745 (1927-1928) [hereinafter cited as Carpenter].

49. Compare, e.g., Quinlivan v. Dail-Overland Co., 274 F. 56 (6th Cir. 1921), with Isbrandtsen v. Local 1291 of Int'l Longshoremen's Ass'n, 204 F.2d 495 (3d Cir. 1953); see also, PROSSER, *supra* note 5, at 941-42 n.79 *et seq.*

50. See, e.g., Kelly v. Central Hanover Bank & Trust Co., 11 F. Supp. 497 (S.D.N.Y. 1935); Kerr v. DuPree, 35 Ga.App. 122, 132 S.E. 393 (1926); McGurk v. Cronenwett, 199 Mass. 457, 85 N.E. 576 (1908); Hornstein v. Podwitz, 254 N.Y. 443, 173 N.E. 674 (1930).

51. See Draft 14, *supra* note 3, § 766, Comment i, at 42; 1 HARPER & JAMES, *supra* note 3, at 497.

52. To ascertain the existence of inducement, one must examine whether the contract would not have been violated at all, or at least not in the way it has been, without the third person's influence.

53. Cf. Harper, *supra* note 26, at 873; Draft 14, *supra* note 3, § 766, Comment r, at 49. Some uncertainties arose in connection with the significance of "malice" or "maliciously" which notions were already used by the judges who decided the leading case *Lumley v. Gye*. Sayre states that these notions were employed "with such an evident contrariety of meanings, that it was impossible to determine . . . what limits were to be set to the doctrine growing out of that case." Note 3 *supra*, at 673. Only by the end of the nineteenth century, a general consensus could be found that

*Beckman v. Marsters*<sup>54</sup> the plaintiff, proprietor of a tourist agency in Boston, and the Jamestown Hotel Corporation made a contract in which the plaintiff agreed to represent the hotel corporation throughout the New England states, to establish sub-agencies in that territory, and to use every possible endeavor personally and through his agents to book persons for the "Inside Inn," a hotel erected by the Jamestown Hotel Corporation. It was further agreed that the plaintiff was to be the exclusive agent of the hotel corporation in the territory, that the corporation was to pay twenty-five cents a day for each person sent by him to the hotel and was to furnish the plaintiff with all necessary "literature." The defendant, another ticket and tourist agent in Boston, a competitor of the plaintiff, induced the hotel corporation to enter into a contract with him,

whereby it was agreed that [he] should have the same rights that had been given to the [plaintiff], and that he should be paid by the corporation 25 cents per capita per day for each guest whom he should secure for the "Inside Inn."<sup>55</sup>

The defendant had knowledge of the contract between the plaintiff and the corporation, and he acted for the purpose of getting for himself business to which the plaintiff alone was entitled under his contract. Justice Loring stated that

in the case at bar there was no necessity of proving spite or ill will toward the plaintiff. This is not a case where there was an abuse of what, if done in good faith, would have been a justification, but a case where the defendant with knowledge of the contract between the hotel corporation and the plaintiff intentionally and without justification induced the hotel corporation to break it.<sup>56</sup>

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the doctrine stated by *Lumley v. Gye* was not confined to instances of acting with "malevolence." But what positively is meant by "malice" is still unclear though the courts use and repeat this formula more or less regularly as one of the requirements for Tort. According to *Beckman v. Marsters*, 195 Mass. 205, 80 N.E. 817 (1907), the existence of "malice" consists in proving the defendant's knowledge of the contract and his intention to induce the Debtor to breach it. The defendant must have acted without justification. "Malice" was becoming little more than an empty phrase "with small practical influence in the reaching of actual decisions." Sayre, *supra* note 3, at 675, 673, 674. In a vague way, Harper and James state that "'Malice' means little more than the intentional invasion of the plaintiff's interests without a privilege to do so." Note 3 *supra*, at 492. What the meaning of "little more than intentional invasion" should be remains vague. After all, Draft 14, in § 766, Comment s, at 49, mentions "that what is meant is not malice in the sense of ill will but merely purposeful interference without justification." See also Carpenter, *supra* note 48, at 736. Compare, Sayre, *supra* note 3, at 679 ("The requisite 'malice' . . . must be the conscious intention to appropriate for oneself that which by law belongs to another, — something akin to the *animus furandi* of a thief.")

54. 195 Mass. 205, 80 N.E. 817 (1907).

55. *Id.* at 208, 80 N.E. at 817.

56. *Id.* at 212, 80 N.E. at 819.

The defendant was restrained from directly or indirectly acting as agent of the hotel corporation within the New England states.

In some situations, the third person may have a justification or privilege for inducing the Debtor to break his contract. As Draft 14 suggests,<sup>57</sup> if the interference with the Creditor's contract was incidental, the question especially arises whether the action was privileged.<sup>58</sup> The authors inserted in the Draft a "factor" for determining whether an act described in § 766 is privileged: "[w]hether the act is for the purpose of causing the interference, or it is not desired and is merely incidental to another purpose."<sup>59</sup>

Practically unanimously, courts deny that the right of competition is a justification. "The right of competition is not the right to destroy contractual rights."<sup>60</sup> In *Imperial Ice Co. v. Rossier*,<sup>62</sup> the court said:

A party may not, however, under the guise of competition actively and affirmatively induce the breach of a competitor's contract in order to secure an economic advantage over that competitor.<sup>62</sup>

This principle is also recognized in Draft 14; the Comment on subsection 2 says:

[T]he social interest in the security of transactions and the greater definiteness of C's expectancy outweigh the interests of A's freedom of action in this situation.<sup>63</sup>

Particularly under the influence of *Knapp v. Penfield*,<sup>64</sup> *Petit v. Cuneo*,<sup>65</sup>

57. Note 3 *supra*, § 766, Comment j, at 43.

58. In connection with the opinions of HARPER & JAMES, and PROSSER, *see* notes 45 & 47 *supra*.

59. Draft 14, *supra* note 3, § 767(f). Since § 766, Comment j, is a compromise position, the drafters put clause (f) into brackets. This clause is only to be added if the compromise is approved. *See id.* § 766 (Note to Institute at 65). The textual identification of "purpose" with "desire" is confusing.

To make clear the difference between "procuring" and "causing" a breach of contract — whereas only "procuring" should make the third person liable, *see* note 43 *supra* — Sayre had to refer to motives. Thus, the motive for the inducer's conduct plays an eminent role in Sayre's theory. The distinction between these two notions "depends, in the last analysis, upon a purely mental element." Sayre, *supra* note 3, at 678. Sayre continues: "If cases of incidentally causing breaches of contract are to be distinguished from cases of *procuring*, and if this distinction must rest in the last analysis upon the evident motive which caused the defendant to act, there remains the question of just what kind of motive must be proved." *Id.* at 679.

60. *Sorenson v. Chevrolet Motor Co.*, 171 Minn. 260, 214 N.W. 754 (1927) (and cases cited therein).

61. 18 Cal.2d 33, 112 P.2d 631 (1941).

62. *Id.* at 37, 112 P.2d at 633. *Cf. also* *Romano v. Wilbur Ellis and Co.*, 82 Cal.App.2d 670, 186 P.2d 1012 (1947). The only case found indicating that any interference with contractual relations based on competition is a justification is *Chambers v. Probst*, 145 Ky. 381, 140 S.W. 572 (1911).

63. Draft 14, *supra* note 3, § 768, Comment i, at 74. With regard to other cases of interference with contractual relations, *see id.* § 768(1)(a)-(d), at 66.

64. 143 Misc. 132, 256 N.Y.S. 41 (1932).

65. 290 Ill.App. 16, 7 N.E.2d 774 (1937).

*Morgan v. Andrews*,<sup>66</sup> *Ford v. C. E. Wilson and Co.*,<sup>67</sup> and *Winters v. University District Building and Loan Ass'n*,<sup>68</sup> and contrary to the Restatement of Torts, Draft 14 recognizes the "Privilege of One Having Financial Interest in Business of Person Induced." This reaches cases of inducing breach of contract and not only those of "general" interference with contractual relations. However, it is required that

the actor (a) does not employ improper means, and (b) acts to protect his interest from being prejudiced by the contract or relation.<sup>69</sup>

Under "financial interest in another's business" is understood "an interest in the nature of an investment."<sup>70</sup> Persons who may be considered to have this privilege are a part owner of a business, a partner or stockholder, or a bondholder as well as another creditor.<sup>71</sup> If the actor's conduct is directed to protecting his interest from prejudice by the contractual relation, it is unimportant and immaterial that he also takes a "malicious delight" in causing harm,<sup>72</sup> provided that his methods are not improper.<sup>73</sup>

66. 107 Mich. 33, 64 N.W. 869 (1895).

67. 129 F.2d 614 (2d Cir. 1932).

68. 268 Ill.App. 147 (1932).

69. Draft 14, *supra* note 3, § 769, at 75; *see also* PROSSER, *supra* note 5, at 944-45.

70. Draft 14, *supra* note 3, § 769, Comment a, at 75.

71. *Id.* But "the interest of a person who looks to the other for business and will lose business opportunities if the other enters into the business relations involved is not a financial interest under the rule stated in this Section." *Id.* In this context, a case should be mentioned in which the issue was decided whether directors were to be held liable for having caused their corporation to breach a contract. Justice Gavan stated:

In the exercise of their discretion, and in acting on their judgment for the benefit of their corporation, the directors should be free from possible liability of that kind. Moreover, it would not seem feasible to draw a line between directors' acts which are dictated by no other motive than the performance of their duties as directors and their acts which, though they may be performed in transacting the business of the corporation, are actuated by ulterior motives — such as the motive to bring about a breach of corporate contract.

*Lukach v. Blair*, 108 Misc. 20, 178 N.Y.S. 8 (1919). The question is whether or not it is necessary to take refuge in the argument. The board of directors is a body by which the will of the corporation is formed and through the members of which the corporation is acting. The decision of the board of directors is made by its members (or by a majority of them). But, since the will of the corporation is formed by the board or by its members, it would be a *contradictio in adiecto* to say the board can influence the will of a corporation in the sense of a third person and thus — like an inducer — cause the corporation to breach its contract. A decision of the board can be a decision to commit a breach of contract, but never an inducement to do so.

72. *See* Draft 14, *supra* note 3, § 769, Comment b, at 76.

73. Improper means or methods include violence, intimidation, threats, misrepresentation, defamation, bribery. *See* PROSSER, *supra* note 5, at 936-37; Draft 14, *supra* note 3, § 769, Comment c, at 77, § 768, Comment on Clause b, at 70; *see also* *Angle v. Chicago, St. P., M. & O. Ry.*, 151 U.S. 1 (1893); *Sparks v. McCrary*, 156 Ala. 382, 47 So. 332 (1908); *Bartlett v. Federal Outfitting Co.*, 133 Cal.App. 747, 24 P.2d 877 (1933); *Stebbins v. Edwards*, 101 Okla. 188, 224 P. 714 (1924).

Other privileges are the "Privilege of Person Responsible for Welfare of Another";<sup>74</sup> the "Privilege to Give Information or Advice";<sup>75</sup> and the "Privilege to Assert Bona Fide Claim."<sup>76</sup> Draft 14 mentions as a special category "Contracts Illegal or Contrary to Public Policy." It states:

One who by proper means causes the non-performance of a bargain which is illegal, or the purpose or effect of which is in violation of a defined public policy, is not liable for pecuniary harm resulting from such non-performance.<sup>77</sup>

The Drafters broadened this Section from the Restatement (First); thus, contracts illegal for reasons other than violation of public policy are included. Rightly, in the author's view, Section 774 of Draft 14 no longer mentions "Privilege" because this provision covers above all cases in which contracts are entirely void, and not merely voidable. It would be illogical to say the in-

74. "One who is charged with responsibility for the welfare of another is privileged purposely to cause him not to perform the contract if the actor (a) does not employ improper means and (b) acts to protect the welfare of the other." RESTATEMENT OF TORTS § 770. It might be important to mention that this privilege extends to volunteered as well as requested advice, in contrast to the privilege of § 772(b) of Draft 14 as described in note 75 *infra*. See *Legrís v. Marcotte*, 129 Ill.App. 67 (1906).

75. "One is privileged purposely to cause another not to perform a contract . . . with a third person, by giving the other (a) truthful information without more or (b) honest advice within the scope of a request for advice from the other." Draft 14, *supra* note 3, § 772, at 79. The aim of this rule is to protect the public and private interest "in freedom of communication and friendly intercourse." *Id.* § 722, Comment a, at 79. In this context, see PROSSER, *supra* note 5, at 944. This category of privilege is especially important for lawyers, medical doctors, bankers and other types of experts and counselors in connection with the performance of their professions. Sayre, *supra* note 3, at 683, too, refers to the "lawyer-instance." He also admits that the actor should escape liability, but he does not mention "justification" or "privilege." Instead, he states: "The real reason seems to be the fact that the defendant . . . may be said to have incidentally caused, but not to have procured the breach, or, to be more precise, the fact that the defendant was not seeking to appropriate for himself the promised advantages of the plaintiff, but was seeking an object quite foreign to that which the plaintiff sought in the making of the contract." *Id.* (For a discussion of Sayre's thesis concerning the difference between "procuring" a breach of contract and "causing" a breach, see notes 59 and 44 *supra*). See also, *Lee v. Silver*, 262 App.Div. 149, 28 N.Y.S.2d 333 (1941); *Coakley v. Degner*, 191 Wis. 170, 210 N.W. 359 (1926); *Arnold v. Moffitt*, 30 R.I. 310, 75 A. 502 (1910). Of course, difficulties in practice may arise in answering the question as to whether or not the advice was "within the scope of the request for the advice." The Drafters of the Restatement (Second) of Torts do not give any concrete solution. They point out that it is "a question of fact under the circumstances to be determined in the light of the total transaction between the adviser and the person advised." Draft 14, *supra* note 3, § 722, Comment c, at 80.

76. "One is privileged purposely to cause another not to perform a contract . . . with a third person by in good faith asserting or threatening to protect properly a legally protected interest of his own which he believes may otherwise be impaired or destroyed by the performance of the contract or transaction." RESTATEMENT OF TORTS § 773. See PROSSER, *supra* note 5, at 944; see also *Meason v. Ralston Purina Co.*, 56 Ariz. 291, 107 P.2d 244 (1940); *O'Brien v. Western Union Tel. Co.*, 62 Wash. 598, 114 P. 441 (1911).

77. Draft 14, *supra* note 3, § 774.

ducer was privileged to act when, on the other hand, the "Creditor" himself has, in fact, no claim against his "contractual" opponent.<sup>78</sup>

#### B. France

Kurt Lipstein's statement, "[t]he common law tort of inducing a breach of contract . . . does not appear in the civil law"<sup>79</sup> has been heavily criticized:

This opinion is subject to question though it stems from a highly respected expert in comparative law. As far as it refers to the German, Austrian or Swiss law, the statement may be accurate with certain reservations. But in as much as it relates to the French law, which is one of the main representatives of the "civil law family," [the] opinion is imprecise<sup>80</sup>

The French courts recognize the liability of the third person who, knowing the existence of a contractual relationship, induces a contracting party to breach the contract. The statutory basis for this liability is Article 1382 of the Civil Code:

Any act of a person which causes damage to another makes him by whose fault the damage occurred liable to make reparation for the damage.<sup>81</sup>

One of the leading French decisions is the *Huguette Duflos Case*,<sup>82</sup> almost exactly parallel to *Lumley v. Gye*. A theatre director engaged Huguette Duflos though he knew that the actress, by accepting his offer, would violate her contract with the Comédie Française. Huguette Duflos and the director were held jointly and severally liable for the loss caused to the Creditor of the first contract. An appeal from the judgment of the Cour de Paris (Ire chambre) was dismissed by the Chambre des Requêtes on June 2, 1930.

As mentioned above, knowledge of the contract's existence is generally the only requirement for the inducer to be liable for his action.<sup>83</sup> In addition to knowledge, "fraudulent machinations" (*concert frauduleux*) are required in cases of multiple sales of real estate, that is, the second purchaser is not protected if his purchase is based on a *concert frauduleux* with the seller, though all requirements for registration of the sale were fulfilled by the second purchaser before the first completed them.<sup>84</sup>

78. See also PROSSER, *supra* note 5, at 931; 1 HARPER & JAMES, *supra* note 3, at 495; Harper, *supra* note 26, at 878-79; *Miles Medical Co. v. J.D. Park & Sons Co.*, 220 U.S. 373 (1911); *Bailey v. Banister*, 200 F.2d 683 (10th Cir. 1952); *Seitz v. Michel*, 148 Minn. 474, 181 N.W. 106 (1921); *Shaw v. Fisher*, 113 S.C. 287, 102 S.E. 325 (1919).

79. Lipstein, *Protected Interest in the Law of Torts*, 1963 CAMBRIDGE L. J. 103.

80. J.-M. Grossen, *La responsabilité du tiers complice de la violation d'un contrat*, in MÉLANGES WILHELM SCHOENBERGER 126 (1968) [hereinafter cited as Grossen].

81. C. CIV. art. 1382 (Fr.) (A. von Mehren trans.).

82. GAZ.PAL. 1930, 2, 119.

83. See Cour d'Appel de Paris, 18 March 1927, GAZ.PAL. 1927, 2, 804-85; Chambre des Requêtes, 17 June 1927, GAZ.PAL. 1927, 2, 431; arrêt de la Chambre civile, section civile, [1948] D. Jur. 421 note Lenoan; arrêt de la Chambre Civile, [1958] D. Jur. 763.

84. Judgment of the Chambre des Requêtes, [1925] S. Jur. II 1, 101.



However, inducing someone to sell the object to a person other than the one to whom it was originally agreed is not regarded as inducement to break a contract because, under Article 1583 of the Civil Code, a violation of the first purchaser's claim is not possible at all. As soon as the parties (seller and purchaser) have agreed upon the object and the price, the sale becomes complete between them and ownership vests in the purchaser as against the vendor even if the object has not yet been delivered or the price paid. In other words, if the second purchaser induces the seller to deliver the specific object to him rather than to the first purchaser, there is a possible case of violation of the first purchaser's *ownership*. The second purchaser is protected only if an object of personal property was delivered to him and he had acted in good faith regarding possession<sup>85</sup> or he was registered as the new owner of realty before the first purchaser and there was no *concert frauduleux* with the seller.<sup>86</sup> Most French commentators share the courts' opinion that the inducer's liability is tortious.<sup>87</sup>

As to enticement of employees, a provision in the Labor Code forbids the third person to induce an employee to break his contract with his employer.<sup>88</sup> In contrast to Switzerland and Germany, however, France has no code on unfair competition. Thus, the tort articles of the Civil Code apply to any conduct involving unfair competition, as it is often the case in connection with inducing breach of contract.

### C. Federal Republic of Germany

In the Federal Republic of Germany, as in Switzerland, the situation is more complex. Depending upon the applicable statute the conduct of the inducer is classified as unlawful or as *contra bonos mores*.<sup>89</sup> A further complication is that both countries have codes on unfair competition. From a common law lawyer's viewpoint it may be difficult to understand why the situation in Germany and Switzerland should be more complicated though both nations have statutes applying to the third person's conduct in inducing a breach. The complication arises from several court decisions which make it difficult clearly to discern the criteria under which the provisions are applicable to the various cases. One must take into account that the courts play a different role in civil

85. C. CIV. art. 1141 (Fr.). Publicite fonciere, Decree of January 14, 1955.

86. In this sense, one may say that the transfer of the ownership cannot be invoked against third persons unless the object has been transferred to the purchaser or the purchaser has been registered. See Judgment of the Chambre des Requêtes, [1925] S. Jur. II 1, 101; R. SAVATIER, LA THÉORIE DES OBLIGATIONS (VISION JURIDIQUE ET ÉCONOMIQUE) 211 n.148 (1967); R. KRASSER, DER SCHUTZ VERTRAGLICHER RECHTE GEGEN EINGRIFFE DRITTER 35 (1971) [hereinafter cited as KRASSER].

87. See, e.g., A. WEILL, DROIT CIVIL, LES OBLIGATIONS 547 (1971). Demogue has another point of view: contractual liability of the third person. 7 R. DEMOGUE, TRAITÉ DES OBLIGATIONS EN GÉNÉRAL, II EFFETS DES OBLIGATIONS 600 (1933).

88. C. TRAV. art. L. 122-15 (Fr.).

89. In a broader sense, acts *contra bonos mores* may be classified as unlawful too. But for an easier understanding, one should distinguish here between acts which are unlawful and those which are considered *contra bonos mores*.

law countries than within the common law system. The lawmaking of civil law courts is largely confined to interpretation of existing statutes and other provisions and the courts do not feel bound to follow precedents in the same way as do the common law courts. From this a certain ambiguity may result, especially where the court cannot find provisions which are explicitly applicable to the particular case at hand. Many of the judgments are based on such provisions, so it stands to reason that the more the courts interpret these statutes, the more the commentators try to influence the judges in favor of uniform judgments. That the commentators, too, reach differing conclusions does not help clarify the situation of the actual law.

In Germany, Section 826 of the Civil Code<sup>90</sup> and, in cases of unfair competition, Section 1 of the Statute Against Unfair Competition<sup>91</sup> apply to inducing breach of contract where "special provisions" are not applicable. Section 826 BGB and Section 1 Un1WG forbid actions *contra bonos mores*.<sup>92</sup> Whereas, the VI. Zivilsenat of the former Reichsgericht based its judgments on Section 826 BGB, the II. Zivilsenat was concerned with cases in the realm of unfair competition. In contrast to the II. Zivilsenat, the VI. Zivilsenat required "special circumstances" to find the third person liable. "Special circumstances" could lie in the *manner* in which the Debtor was induced to breach the contract, such as threat or deception,<sup>93</sup> untrue suspicions or derogatory contentions in relation to the Creditor,<sup>94</sup> inducing the seller to breach his contract (and to transfer the goods to the inducer) by offering a higher price than was stipulated with the first buyer, constant and systematic pressure, or the promise of warranty against all claims for recourse.<sup>95</sup> The *purpose* for which the breach of contract was committed and the consequences to the prejudiced party<sup>96</sup> were further criteria.

The II. Zivilsenat stated<sup>97</sup> that in the course of business *intention* is the only

90. Law of Aug. 18, 1896, [1896] *BUERGERLICHES GESETZBUCH* (Civil Code) [BGB] § 826 (Ger.).

91. Law of June 7, 1909, [1909] *Gesetz gegen den unlauteren Wettbewerb* (Statute against the Unfair Competition) [Un1WG] § 1 (Ger.).

92. § 826 BGB provides that "[O]ne, who designedly injures another in a manner violating good morals is bound to indemnify the other for the injury." (W. Loewy, trans.). § 1 Un1WG states that "[O]ne, who in the course of business acts with intent to create competition may be subject to an order to cease and desist and held liable for damages if his conduct violates good morals."

93. Judgment of May 30, 1910, VI. Zivilsenat, Ger., [1910] *Juristische Wochenschrift* [JW] 705, No. 5.

94. Judgment of May 31, 1906, VI. Zivilsenat, Ger., [1906] JW 465.

95. Judgment of April 27, 1931, VI. Zivilsenat, Ger., 86 *SEUFFERTS ARCHIV FÜR ENTSCHEIDUNGEN DER OBERSTEN GERICHTE IN DEN DEUTSCHEN STAATEN* [SEUFFA BD.] 48.

96. Judgment of April 3, 1913, VI. Zivilsenat, Ger., [1913] JW 866, No. 11; *see also* Judgment of Jan. 26, 1910, VI. Zivilsenat, Ger., [1910] 15 *GEWERBLICHER RECHTSSCHUTZ UND URHEBERRECHT* [GRUR] 86; Judgment of Jan. 23, 1922, 103 *RGZ* 421; KRASSER, *supra* note 86, at 220.

97. *See* Judgment of Dec. 10, 1912, II. Zivilsenat, Ger., 81 *RGZ* 91; Judgment of April 27, 1931, II Zivilsenat, Ger., 86 *SEUFFA BD.* 49.

requirement to classify inducement as an act *contra bonos mores*. The basic provision applied by this Senat was Section 1 Un1WG.

The decision of December 10, 1912,<sup>98</sup> by the II. Zivilsenat can be considered the leading case for the later development within the II. Zivilsenat<sup>99</sup> and within the Bundesgerichtshof for Civil Matters, the highest civil court under the Constitution of 1949 (*Grundgesetz*) which adopted the principle of that Zivilsenat of its predecessor court. Thus, even in the absence of special circumstances, the inducement to break a contract generally contradicts the standards of a "fair average businessman" and, therefore, violates the basic rules of fair competition within the meaning of Section 1 Un1WG where the conduct was (a) intentional and (b) meant to create competition.<sup>100</sup> In a small number of cases, however, the Bundesgerichtshof has taken a different position and focused on "special circumstances."<sup>101</sup> Unfortunately, all the judgments of this court concerned cases where the inducer meant to create competition. There is no evidence that the opinion of the II. Zivilsenat of the former Reichsgericht would have influenced the Bundesgerichtshof in cases to which Section 826 of the BGB rather than Section 1 of the Un1WG applied.

Some statutes have so far had no great importance for the judicial opinions though they are *explicitly* concerned with inducing breach of a contract. Section 20 of the Un1WG deals with inducement to disclose business secrets confided

98. *Id.*

99. See Judgment of March 16, 1934, II. Zivilsenat, Ger., [1934] 39 GRUR 610; Judgment of Nov. 6, 1934, II. Zivilsenat, Ger., [1935] 40 GRUR 323; Judgment of Oct. 11, 1935, II. Zivilsenat, Ger., 148 RGZ 370; Judgment of Nov. 2, 1938, II. Zivilsenat, Ger., [1939] 44 GRUR 566; see also cases cited in note 100 *infra*. In the Judgment of Oct. 6, 1931, II. Zivilsenat, Ger., 133 RGZ 330, and Judgment of May 10, 1932, II. Zivilsenat, Ger., [1932] Markenschutz und Wettbewerb [MuW] 337, the II. Zivilsenat demanded, in connection with vertical price binding contracts, as an additional requirement for the application of § 1 Un1WG that the inducer must have obtained an advantage over his competitors. In the Judgment of Oct. 27, 1933, II. Zivilsenat, Ger., [1934] MuW 64, the same Senat focused on the requirement of "special circumstances," similar to the reasoning of the VI. Zivilsenat.

100. Judgment of Feb. 17, 1956, Bundesgerichtshof, W. Ger., [1956] 58 GRUR 275; see also Judgment of Nov. 13, 1953, Bundesgerichtshof, W. Ger., [1954] 56 GRUR 164; Judgment of March 17, 1961, Bundesgerichtshof, W. Ger., [1961] 63 GRUR 483; Judgment of March 8, 1962, Bundesgerichtshof, W. Ger., 37 Bundesgerichtshof in Zivilsachen [BGHZ] 32; Judgment of June 14, 1963, Bundesgerichtshof, W. Ger., [1964] 66 GRUR 157; Judgment of Jan. 10, 1964, Bundesgerichtshof, W. Ger., [1964] 66 GRUR 323.

101. In the Judgment of May 20, 1960, [1960] 62 GRUR 559, the Bundesgerichtshof, in applying § 1 Un1WG, has focused on whether the third person had induced the Debtor to breach an "essential obligation" of the contract. Seven years later, in the Judgment of April 26, 1967, [1968] 70 GRUR 100, the court focused, in connection with a price-binding clause, on a similar circumstance as had the Reichsgericht in the Judgment of May 10, 1932, *supra* note 99. Later, the Bundesgerichtshof declared that "all circumstances of the single case" must be taken into account in deciding if the inducer acted *contra bonos mores* in the sense of § 1 Un1WG. Judgment of March 28, 1969, [1969] 71 GRUR 474. In 1970, the court returned to the reasoning of the Judgment of Dec. 10, 1912, *supra* note 97, and upheld that decision without reservation. Judgment of Sept. 25, 1970, [1970] 73 GRUR 122; Judgment of Jan. 30, 1976, [1976] 78 GRUR 372.

in the course of employment; Section 125 of the German Ordinance of Trade (*Gewerbeordnung* or GeWO) of July 26, 1900, involves enticement of journeymen. Both provisions are considered so-called "special protection laws" within the meaning of Section 823, II BGB. Therefore, cases of inducing breach of contract to which Section 20 Un1WG and Section 125 GeWO apply are classified as *unlawful* (*widerrechtlich*) and not as *contra bonos mores*.<sup>102</sup>

As mentioned before, the opinions of the commentators are divergent. One states that intentionally inducing breach of a contract is generally an act *contra bonos mores*.<sup>103</sup> It is unimportant to him whether the third person induces with the intent to create competition. Others are of the same opinion.<sup>104</sup> In contrast, some commentators are more restrictive.<sup>105</sup> Generally they hold that the sole intention is not enough to classify the inducement as an act *contra bonos mores*; rather, they focus either on the goal the third person pursues or on the means he applies. They mention as goals, prejudice to the Creditor and pursuit of profit, and as means, threat, intimidation, fraud, indemnification for penalty for nonperformance of the contract and planned, systematic proceedings by the inducer.<sup>106</sup>

Regarding cases of inducing with the purpose to create competition, several commentators<sup>107</sup> agree with the reasoning of the II. Zivilsenat in the Judg-

102. For details see P.H. EULAU, VERLEITUNG ZUM VERTRAGSBRUCH UND AUSNUTZUNG FREMDEN VERTRAGSBRUCHS 100-01, 104 *et seq.* (1976) [hereinafter cited as EULAU].

103. Herrmann, *Verleitung zum Vertragsbruch*, [1955] 57 GRUR 21, 23.

104. W. FIKENTSCHER, SCHULDRECHT § 103, I., 6 (4th ed. 1973); Larenz, *Grundsatzliches zu § 138 BGB*, in 7 JURISTEN—JAHRBUCH 109 (1966); 2 E. REIMER, WETTWERBS UND WARENZEICHENRECHT 35. Kapitel, N.3 (4th ed. 1972) [hereinafter cited as E. REIMER]; A. ROSENTHAL, GESETZ GEGEN DEN UNLAUTEREN WETTBEWERB (KOMMENTAR) § 1, N.140 (9th ed. 1969) [hereinafter cited as ROSENTHAL].

105. Groh, *Sittenwidrige Erfüllungsverletzung*, in 3 DIE REICHSGERICHTSPRAXIS IM DEUTSCHEN RECHTSLEBEN, FESTGABE DER JURISTISCHEN FAKULTÄTEN ZUM 50JÄHRIGEN BESTEHEN DES REICHSGERICHTS 131 (1929); D. REIMER, DEUTSCHLAND, 3 DAS RECHT DES UNLAUTERN WETTBEWERBS IN DEN MITGLIEDSTAATEN DER EUROPÄISCHEN WIRTSCHAFTSGEMEINSCHAFT 249, N.361 (E. Ulmer ed. 1968) [hereinafter cited as REIMER]; Kiss, *Die Verleitung zum Vertragsbruch*, in 1908 DEUTSCHE JURISTEN—ZEITUNG [DJZ] 686; Haager, *Einzelne Schuldverhältnisse*, § 826, Anm. 29, in 2 DAS BÜRGERLICHE GESETZBUCH MIT BESONDERER BERUECKSICHTIGUNG DER RECHTSPRECHUNG DES REICHSGERICHTS UND DES BUNDESGERICHTSHOFES (Reichsgerichtsraeten und Bundesrichtern eds., 11th ed. 1960); Enneccerus & Lehmann, *Recht der Schuldverhältnisse*, in 2 LEHRBUCHS DES BÜRGERLICHEN RECHTS § 236, III, 1 lit. d (L. Enneccerus, T. Kipp & M. Wolff 1958); Reichel, *Reverssystem und Aussenseiter*, in 7 ARCHIV FÜR DIE CIVILISTISCHE PRAXIS, NEUE FOLGE 257 (1927); Fischer, *Die Rechtswidrigkeit mit besonderer Beruecksichtigung des Privatrechts*, in 21 ABHANDLUNGEN ZUM PRIVATRECHT UND ZIVILPROZESS DES DEUTSCHEN REICHES 159 (O. Fischer ed. 1911).

106. For more details, see EULAU, *supra* note 102, at 51 *et seq.*

107. REIMER, *supra* note 105, at N.360-1, 248-49; A. KRAFT, INTERESSENABWÄGUNG UND GUTE SITTEN IM WETTBEWERBSRECHT 238-39 (1963); R. CALLMANN, DER UNLAUTERE WETTBEWERB: KOMMENTAR ZUM GESETZ GEGEN DEN UNLAUTEREN WETTBEWERB MIT NOTVERORDNUNG VOM 9 MÄRZ 1932 UND ZU DEN MATERIELLRECHTLICHEN VORSCHRIFTEN DES GESETZES ZUM SCHUTZE DER WARENBEZEICHNUNGEN § 1, para. 90 (2d ed. 1932); H. TETZNER, KOMMENTAR ZUM GESETZ GEGEN DEN UNLAUTEREN WETTBEWERB 74 (1950).

ment of December 10, 1912.<sup>108</sup> Another theory,<sup>109</sup> similar to that of the Bundesgerichtshof in the decision of May 20, 1960,<sup>110</sup> requires that the third person induced the Debtor to break an "essential obligation" of the contract. Others<sup>111</sup> criticize the opinions of those commentators who would make liability depend differently, according as the inducer acts with or without the purpose of creating competition.

#### D. Switzerland

In contrast to the United States, France and the Federal Republic of Germany, Switzerland is rather sparse in cases involving inducing breach of a contract. The reason may lie in Swiss courts following a more restrictive practice as to the inducer's liability than do the courts of other countries. Therefore, in Switzerland it is much more difficult for a Creditor successfully to file suit against the inducer.

As in Germany, in Switzerland one may (apart from one minor exception)<sup>112</sup> distinguish between cases to which a "general statute," Article 41, II of the Swiss Federal Code of Obligations [OR] is applicable, and those to which provisions on unfair competition apply. According to Article 41, II OR, "[e]very person who, *contra bonos mores*, wilfully causes damage to another is . . . liable for compensation."<sup>113</sup> In a similar way to the German courts in cases to which Section 826 BGB applies, the Swiss Federal Court (*Bundesgericht*) focuses on "*special, aggravating circumstances*" which are required to make the inducer liable. Such circumstances may lie either in the *purpose* the inducer pursues or in the *means* he applies. A purpose which has been held sufficient for liability is the purpose to prejudice based on the mere thirst for revenge; a means is wilfull deceit.<sup>114</sup>

In contrast to the German Un1WG, the Swiss Statute on Unfair Competition [UWG] does not mention "actions *contra bonos mores*," but it forbids the "abuse of business competition by deceptive and other means which contravene the basic rules of *good faith*"<sup>115</sup> That is, in Switzerland, acts against fair competition are classified as unlawful.<sup>116</sup> Paragraph II of Article 1 UWG cites

108. 81 RGZ 91.

109. A. BAUMBACH & W. HEFERMEHL, WETTBEWERBS — UND WARENZEICHENRECHT: WETTBEWERBSRECHT, Un1WG § 1, para. 518 *et seq.* (11th ed. 1974).

110. Judgment of May 20, 1960, Bundesgerichtshof, W. Ger., [1960] 62 GRUR 559.

111. KRASSER, *supra* note 86, at 305 *et seq.*; H. KOZIOL, DIE BEEINTRÄCHTIGUNG FREMDER FORDERUNGSRECHTE 64 (1967) [hereinafter cited as KOZIOL]; *see also* E. REIMER, *supra* note 104, at 35.Kapitel, para. 3; ROSENTHAL, *supra* note 104, § 1, para. 140.

112. SCHWEIZERISCHES STRAFGESETZBUCH [StGB] I art. 162 (Switz.), which, in connection with BUNDESGESETZ UEBER DAS OBLIGATIONENRECHT [OR] I art. 50 (Switz.) may apply to cases of inducing breach of contract. *See* EULAU, *supra* note 102, at 102-03.

113. G. Wettstein, trans.

114. *See* [1926] 52 BGE II 376-77; [1931] 57 BGE II 493.

115. Law of Sept. 30, 1943, [1943] Bundesgesetz ueber den unlauteren Wettbewerb [UWG] I art. 1 (Switz.) (emphasis added).

116. *See* [1966] 92 BGE II 264; [1961] 87 BGE II 115; Germann, *Zur Rechtsfindung im Wettbewerbsrecht auf der Grundlage des Entwurfs eines Bundesgesetzes ueber den unlautern Wettbewerb*, 72

some cases which refer more or less explicitly to inducing breach of contract: giving or offering allowances to employees, agents or other accessories which are not due them violates the basic rules of good faith.<sup>117</sup> The provision presupposes that these allowances are intended to or suitable to induce the employees, agents or other accessories to commit a violation of their duty and to procure for the inducer or another person some advantage.<sup>118</sup> According to Article 1, II lit. f, someone who induces employees, agents or other accessories to disclose a manufacturing or business secret contravenes the rules of good faith. It is necessary, however, that the employee, agent or other accessory has a duty to keep the secret.<sup>119</sup>

The Bundesgericht focused in two decisions on "special circumstances."<sup>120</sup> Unfortunately, in both cases the "predecessor of the UWG," Article 48 OR, applied; the Bundesgericht has never had the opportunity to decide a case on the basis of the present Statute on Unfair Competition.

Swiss commentators state that the Creditor has generally no claim against the inducer; they are of the view that, apart from third party beneficiary contracts, a contract creates a relationship only between the contractual parties; rights and duties can exist only as between them. A claim against a third person should be allowed only as an exception, only if there is an act *contra bonos mores* in the sense of Article 41, II OR.<sup>121</sup> Only a few commentators explain under which conditions inducing breach of a contract is *contra bonos mores*. Some focus on the inducer's intention to cause damage<sup>122</sup> while one adds the

ZEITSCHRIFT DES BERNISCHEN JURISTENVEREINS [ZBJV] 49, 254 (1936) [hereinafter cited as Germann]; 1 A. TROLLER, IMMATERIALGUETERRECHT 3.Kapitel, § 8, V., at 2 (1968) [hereinafter cited as TROLLER]. For the purview of UWG, see EULAU, *supra* note 102, at 61 *et seq.*

117. *Id.*, II art. 1 lit. e.

118. Since the conduct of the third person must only be *determined* or *suitable* to induce an employee to violate his duty, the provision also covers cases where there is no inducing breach of contract.

119. See EULAU, *supra* note 102, at 68.

120. [1926] 52 BGE II 380; [1927] 53 BGE II 321.

121. See Mutzner, *Zur Frage der rechtlichen Wirksamkeit von Kartellabreden gegenueber Aussenseitern*, 23 SCHWEIZERISCHE JURISTEN-ZEITUNG [SJZ] 145, 151 (1926-1927); H. OSER & W. SCHOENENBERGER, DAS OBLIGATIONENRECHT, 5 KOMMENTAR ZUM SCHWEIZERISCHEN ZIVILGESETZBUCH (A. Egger, A. Escher, R. Haab & H. Oser eds. 1929) [hereinafter cited as OSER & SCHOENENBERGER]; A. VON TUHR, ALLEGMEINER TEIL DES SCHWEIZERISCHEN OBLIGATIONENRECHTS, I, § 46, II, 1 (2d ed. A. Siegwart 1942); 1 K. OFTINGER, SCHWEIZERISCHES HAFTPFLICHTRECHT: ALLEGMEINER TEIL § 4, II (4th ed. 1975); H. MERZ, BERNER KOMMENTAR: EINLEITUNG UND PERSONENRECHT, EINLEITUNG KOMMENTAR ZU ART. 2 ZBG, N.564 (1962); B. VON BUEREN, SCHWEIZERISCHES OBLIGATIONENRECHT, ALLEGMEINER TEIL 53, N.68 (1964); T. GUHL, DAS SCHWEIZERISCHE OBLIGATIONENRECHT § 24, I, 2 (6th ed. H. Merz & M. Kummer 1972) [hereinafter cited as GUHL]; P. ENGEL, TRAITE DES OBLIGATIONS EN DROIT SUISSE 103 (1973) [hereinafter cited as ENGEL]; M. REHBINDER, GRUNDRISSE DES SCHWEIZERISCHEN ARBEITSRECHTS 45 (3d ed. 1975).

122. OSER & SCHOENENBERGER, *supra* note 121, Kommentar zu art. 41 OR, para. 16; see also Jaeggi, *Vorbemerkungen vor art. 1 OR*, para. 68, in 5 W. SCHOENENBERGER & P. JAEGLI, KOMMENTAR ZUM SCHWEIZERISCHEN ZIVILGESETZBUCH: OBLIGATIONENRECHT, pt. V(1)(a) (3d ed. F.W. Buergi, et al. 1973).

criteria of "malice" and "revenge."<sup>123</sup> The means which the third person uses for the inducement are usually applied against the *Debtor* (e.g., threat, wilful deceit and intimidation). If, therefore, the use of such means is classified as *contra bonos mores* or, perhaps, as an unlawful act against the Debtor, it does not automatically follow that the conduct is also a tort against the Creditor.<sup>124</sup> In cases involving an inducement to breach a contract under Article 1, I UWG, the commentators have been unable to reach a common solution. Whereas some apply the reasoning of the Bundesgericht to such cases,<sup>125</sup> others argue that a claim arises even in the absence of "specific circumstances."<sup>126</sup>

#### IV. THE UNDERLYING CONCEPTS LEADING TO THE DIFFERENT SOLUTIONS

##### A. *France*

In France, as mentioned above, the inducer is liable for his conduct under Article 1382 of the Civil Code:

Any act of a person which causes damage to another makes him by whose fault the damage occurred liable to make reparation for the damage.<sup>127</sup>

The provision is applied to inducing breach of contract only under interpretations of Article 1165 of the Civil Code:

Contracts only produce effects between the contracting parties. They do not affect third parties and do not benefit them, except in the case provided by Article 1121.<sup>128</sup>

This principle reflects a basic rule of the Roman law, *inter alios acta vel iudicata aliis non nocere*<sup>129</sup> and thus pertains only to the *effects* of contractual arrangements. This means that rights and obligations can only exist between the parties to the contract<sup>130</sup> and, *e contrario*, "the *existence* of a contract and of its consequences is a fact which a great number of interested parties must respect."<sup>131</sup> This interpretation based on the distinction between *internal effect* of the contract (*effet*) and the *right to invoke it against third persons* (*opposabilité des contrats*) has been generally accepted. Thus, the impairment of contracts by

123. ENGEL, *supra* note 121, at 103. For further details see EULAU, *supra* note 102, at 49 *et seq.*

124. See EULAU, *supra* note 102, at 149 *et seq.*

125. E.g., Germann, *supra* note 116, at 309-10.

126. 2 TROLLER, *supra* note 116, at 19. Kapitel § 59, 2; EULAU, *supra* note 102, at 83 *et seq.*

127. C. CIV. art. 1382 (Fr.) (A. von Mehren, trans.).

128. C. CIV. art. 1165 (Fr.) (H. Cachard, trans.).

129. CODE 7.60.

130. See P. HUGUENY, RESPONSABILITÉ CIVILE DU TIERS COMPLICE DE LA VIOLATION D'UNE OBLIGATION CONTRACTUELLE 204, 214-15 (1910); 1 H. DE PAGE, TRAITÉ ÉLÉMENTAIRE DE DROIT CIVIL BELGE, No. 122, at 131 (1933) [hereinafter cited as DE PAGE].

131. DE PAGE, *supra* note 130 (emphasis added).

third parties' conduct must be considered an infringement of the Creditor's contractual rights.<sup>132</sup> The application of Article 1382 of the Civil Code which protects any kind of assets was made possible.<sup>133</sup> In an analogue to the law of property requiring that, for the protection of the owner against third persons, he must have possession of the personal property or have registered his ownership of the realty,<sup>134</sup> it is essential for the *opposabilité du contrat* that the "outsider," the third person, has knowledge of the existence of the contract.<sup>135</sup>

In the Federal Republic of Germany and in Switzerland no provision compares to Article 1382 of the French Civil Code.

#### B. Federal Republic of Germany

The basic German statute on unlawful acts is Section 823 BGB:

One who, designedly or negligently injures life, body, health, freedom, the property or any right of another in an unlawful manner is bound to indemnify the other for the injury arising therefrom.

The same obligation rests upon one who violates a law, the purpose of which is to afford protection to another . . . .<sup>136</sup>

This provision's first paragraph refers to specific rights (so-called "absolute rights") which may be asserted generally against everybody who interferes with them. The second paragraph classifies conduct as unlawful if it violates "special protection laws." As discussed above, Sections 20 Un1WG and 125 GeWO are considered "special protection laws" which apply to certain cases of inducing breach of contract and which, therefore, make the inducer's act unlawful.

Since Germany does not have a statute explicitly applicable to inducing breach of contract *in general*, some commentators have inquired whether the Creditor's claim as such could be deemed an "absolute right" within the meaning of Section 823, I BGB, with the consequence that interferences with contracts would be unlawful acts against the Creditors. As this section does not mention the claim of the Creditor within the enumerated "absolute rights" it was attempted to interpret the claim as a so-called "other right."<sup>137</sup>

In recent times Koziol, especially, considered the Creditor's claim against the Debtor such an "other right." Since the Creditor can demand the per-

132. See R. SAVATIER, *TRAITÉ DE LA RESPONSABILITÉ CIVILE EN DROIT FRANÇAIS: LES SOURCES DE LA RESPONSABILITÉ CIVILE* no. 144-45, at 187 *et seq.* (2d ed. 1951); 1 H. MAZEAUD, L. MAZEAUD & A. TUNC, *TRAITÉ THÉORIQUE ET PRATIQUE DE LA RESPONSABILITÉ CIVILE DÉLICTEUELLE ET CONTRACTUELLE*, no. 144, at 176 *et seq.* (5th ed. 1957).

133. Limpens, *De l'opposabilité des contrats à l'égard des tiers*, in *MÉLANGES EN L'HONNEUR DE PAUL ROUBIER*, TOME II, at 89, 97 *et seq.* (1961) [hereinafter cited as Limpens].

134. With respect to C. CIV. art. 1583, see § III *supra*.

135. See Limpens, *supra* note 133, at 102 and the explanation and citations in notes 79-88 *supra* and accompanying text.

136. BGB § 823 (W. Ger.) (W. Loewy, trans.).

137. After the enumeration of special "absolute rights," § 823, I BGB refers to "any right of another."



formance of the contract by the Debtor, he has, by the same token, a claim "that the Debtor uses his will according to the contractual provisions."<sup>138</sup> This claim can also be invoked against third persons in the sense that everybody must respect the "bound will" of the Debtor. Thus, the (intentional) inducement to breach a contract is, in this opinion, unlawful within the meaning of Section 823, I BGB.<sup>139</sup> This approach has properly been criticized: a Creditor's claim which can be invoked against everybody not to influence the Debtor's will to perform the contract is nothing more than a right *to* that will.<sup>140</sup> But such a right, as Koziol<sup>141</sup> himself states, contradicts the so-called "right of freedom" or the "freedom of the person," and, therefore, violates the so-called "personal rights."

Another commentator focuses on a "general duty" to abstain from interfering with contractual relations: inducing breach of contract is by nature unlawful because it is an "aimed violation of the Creditor's claim."<sup>142</sup> Unfortunately, this commentator does not present a sufficient argument to support his statement.

In connection with the protection of the Creditor from inducing breach of contract, no commentator has so far considered the Creditor's claim as property, one of the enumerated rights under Section 823, I BGB.<sup>143</sup>

Most of the authors may be reluctant to recognize the Creditor's claim as an "absolute right" such as property out of fear of reintroducing and thus acknowledging the so-called *ius ad rem* of the former Prussian Common Law.<sup>144</sup>

### C. Switzerland

A similar situation is found in Switzerland. The basic provision on unlawful acts is Article 41, I of the Federal Code of Obligations:

Every person who causes damage to another in an unlawful manner, be it wilfully or be it negligently or imprudently, is liable for compensation.<sup>145</sup>

In contrast to Section 823 of the German Civil Code, Article 41, I OR does neither enumerate specifically protectable rights nor refer to "special protection laws." Thus, one can learn the range of the application of this provision only from its interpretation. But it is undisputed today, in the opinions of the courts as well as in the doctrine, that conduct is unlawful if it infringes upon an

138. KOZIOL, *supra* note 111, at 156, 154-55.

139. *Id.* at 163, 185. REHBEIN, *supra* note 14, at 230 *et seq.*, has a similar point of view.

140. KRASSER, *supra* note 86, at 187-88.

141. Note 111 *supra*, at 154, 158.

142. M. LOEWISCH, DER DELIKTSSCHUTZ RELATIVER RECHTE 138 (1970).

143. See EULAU, *supra* note 102, at 140-41 (especially 141n.85).

144. Oertmann, *Der Schadensersatzanspruch des obligatorisch Berechtigten*, in FESTGABE FUER HEINRICH DERNBURG 61, 81 (1900).

145. OR I art. 41 (Switz.) (G. Wettstein, trans.).

"absolute right" such as property, patents, life, body, health and freedom, or "if the conduct contravenes commands or prescriptions of the legal order which are promulgated to protect the violated interest."<sup>146</sup> Thus, in the final analysis, the situation in Switzerland is the same as in the Federal Republic of Germany. There are some special statutes which explicitly procure the Creditor the possibility of a claim against the inducer<sup>147</sup> and which, therefore, make the conduct of the third person unlawful. But, as in Germany, it has been impossible to prove that the contractual claim of the Creditor can be classified as an "absolute right." However, two commentators consider inducement to breach a contract a violation of the Creditor's so-called "personal rights" and, therefore, of an "absolute right" but unfortunately neither gives sound reasons for this assertion.<sup>148</sup> Others, too, classify the inducer's conduct as unlawful without giving any specific explanations.<sup>149</sup> Moreover, Switzerland does not acknowledge the *ius ad rem*.

Thus, in Germany and Switzerland, the only remaining possibility is to apply Section 826 of the German Civil Code or Article 41, II of the Swiss Federal Code of Obligations to inducing breach of contract.<sup>150</sup> However, to classify the conduct of the inducer as *contra bonos mores* one must focus on "special circumstances." Otherwise one would, quasi-indirectly, recognize an "absolute right" of the Creditor which would contradict the arguments above.

The German Bundesgerichtshof does not require "special circumstances" in cases of *unfair competition*, perhaps because the court acknowledges a kind of specific relationship between competitors based on their common interest in making profit. But only the interest is common; the way to achieve a profit is almost always independent and in conflict. In fact, each competitor seeks to maximize his profit, often regardless of the impact his behavior might have on others. The danger of abuse of one's economic freedom is, therefore, very great. It is the task of the legislature and the courts to set limits on the competitor's conduct to protect and thus to guarantee a public interest in economic fairness. From this point of view it must be understood that the Bundesgerichtshof maintains a stricter attitude toward liability in cases of inducing breach of contract where the inducer and Creditor are competitors. The posi-

146. [1968] 94 BGE I 642-43; see also GUHL, *supra* note 121, I., 2; 1 K. OFTINGER, SCHWEIZERISCHES HAFTPFLICHTRECHT: ALLEGEMEINER TEIL, § 4., II (4th ed. 1975).

147. See [1943] UWG I art. 1 lit. e&f (Switz.); StGB art. 162 (Switz.), in connection with OR I art. 50 (Switz.).

148. See C.-P. MERCIER, FAUT-IL ADMETTRE L'EXISTENCE DU JUS AD REM EN DROIT CIVIL SUISSE?, at 157 *et seq.* (1929); A. EGGER, EINLEITUNG UND PERSONENRECHT, 1 KOMMENTAR ZUM SCHWEIZERISCHEN ZIVILGESETZBUCH KOMMENTAR ZU ART. 28 ZGB, N.69. (2d ed. A. Egger, A. Escher, R. Haab & H. Oser 1930).

149. See EULAU, *supra* note 102, at 124 *et seq.* Also Grossen, *supra* note 80, at 135 and Yung, *Principes fondamentaux et problèmes actuels de la responsabilité civile en droit suisse*, in COLLOQUE FRANCO-GERMANO-SUISSE SUR LES FONDEMENTS ET LES FONCTIONS DE LA RESPONSABILITÉ CIVILE 93, 123 (F.-E. Klein ed. 1973), classify the inducer's conduct as unlawful without giving specific explanations.

150. Insofar as no "special statutes" are applicable, of course.

tion of the Swiss Bundesgericht remains uncertain; no cases are known in which Article 1, I UWG, has been applied. The author believes, however, that it is unnecessary that the Swiss court focuses on "special circumstances" to classify inducing breach of contract as an act of unfair competition.<sup>151</sup>

#### D. *United States*

In the United States, the commentators generally consider the Creditor's claim against the Debtor as a right *cognate to property* which is protected within limits from interferences by *third parties*. This result is seen as "the practical effect of the *Lumley v. Gye* doctrine [which] is the creation of a new right, *running against the world*."<sup>152</sup> Thus, this right has been defined as a right *in rem*.<sup>153</sup> The opinion of Chief Justice Gaines must be understood in this sense:

It seems to us that, where a party has entered into a contract with another to do or not to do a particular act or acts, he has a clear right to its performance as he has to his property, either real or personal; and that knowingly to induce the other party to violate it is as distinct a wrong as it is to injure or destroy his property.<sup>154</sup>

Moreover, the case of *Lumley v. Gye* may also be seen as the threshold for the subsequent development that has, in some sense, extended the doctrine on inducing breach of a contract "to interference with advantageous economic relations even where they have not been cemented by contract."<sup>155</sup> The concept that the Creditor's claim against the Debtor is classified as a right cognate to property has its roots in the subordination of contract to the law of property. This lasted until 1790 when the first recognition of expectation damages appeared and formed the "cornerstone" for the will theory of contract.<sup>156</sup>

#### V. CONCLUSION

As mentioned at the beginning of this article, to answer the question as to whether the inducer can be sued successfully by the Creditor of the contract, it is necessary to start from the principle of "privity of contract." This means

151. See EULAU, *supra* note 102, at 83 *et seq.*

152. Sayre, *supra* note 3, at 676 n.45.

153. *Id.*; see also PROSSER, *supra* note 5, at 930-31; 1 HARPER & JAMES, *supra* note 2, at 497-98; Carpenter, *supra* note 48, at 733 (and citations therein). Compare Draft 14, *supra* note 3, § 766: "[T]here is a *general duty* not to interfere intentionally with another's reasonable business expectancies of trade with third persons, whether or not they are secured by contract . . ." *Id.* (emphasis added).

154. Raymond v. Yarrington, 96 Tex. 443, 72 S.W. 580, 73 S.W. 800 (1903); see also S.C. Posner Co., Inc. v. Jackson, 223 N.Y. 325, 119 N.E. 573 (1918); Goldman v. Harford Road Bldg. Ass'n., 150 Md. 677, 133 A. 843 (1926); Carolina Overall Corp. v. East Carolina Linen Supply, Inc., 8 N.C. App. 528, 174 S.E.2d 659 (1970). In Sorenson v. Chevrolet Motor Co., 171 Minn. 260, 214 N.W. 754 (1927), Chief Justice Wilson states: "When one has knowledge of the contract rights of another, his wrongful inducement of a breach thereof is a willful destruction of the property of another." *Id.* at 266, 214 N.W. at 756.

155. PROSSER, *supra* note 5, at 931.

156. See M. J. Horwitz, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860, at 160 *et seq.* (1977).

that only the Creditor can demand the accomplishment of his claim and only the Debtor can be forced to fulfill his duty. In addition, one must consider the third person's interest in keeping his freedom of individual action, a part of which is freedom of contract in the sense of freedom to enter into contracts and to choose his contractual partner. On one side is the Creditor's interest in the integrity of his contractual relationship with the Debtor which may involve commercial expectancies. On the other side is the third person's interest in free action. One must determine when and to what extent one interest is to be sacrificed to the benefit of the other. Thus, the extent to which each interest is protected by the law vis-a-vis the other is the result of a weighing and balancing process. From this process may depend decisively the legitimacy of holding the inducer responsible and liable.

The United States and France strongly emphasize the protection of the contractual relationship, and, therefore, of the Creditor's claim from interference by third persons. Both countries generally classify inducing breach of contract as unlawful if the inducer acted intentionally. While American courts focus on a right of the Creditor cognate to property, the French decisions are based on the rule of Article 1382 of the Civil Code.

Neither the laws of the Federal Republic of Germany nor those of Switzerland recognize a general protection for contractual rights as such. These rights are protected only within the limits of Section 826 of the German Civil Code and Article 41, II of the Swiss Federal Code of Obligations. Both of these provisions focus on damages caused by conduct *contra bono mores*. To apply Section 826 BGB and Article 41, II OR, to cases of inducing breach of contract, "special circumstances" are generally required as part of the inducer's conduct. However, there are some tendencies which try to classify the third person's conduct as unlawful in the sense of Section 823 BGB and Article 41, I OR.

In contrast to the United States and France, Germany and Switzerland have particular statutes on unfair competition. As far as such special provisions apply to the inducer's conduct, the German Bundesgerichtshof generally does not require "special circumstances" to hold the third person liable. The Swiss Bundesgericht has not so far had the opportunity to decide a case of inducing breach of contract to which the Statute on Unfair Competition was applicable. While the German law classifies any act of unfair competition as *contra bonos mores*, in Switzerland such acts are considered unlawful. In addition, there are some other special statutes of minor importance which in France, Germany and Switzerland may apply to inducing breach of contract.

The question remains whether the third person's interest in freedom of action is more restricted, to the benefit of the Creditor's interest in the integrity of his contractual relationship, where no "special circumstances" are required to classify inducing breach of contract as unlawful or as *contra bono mores*. If the answer is affirmative, we must decide if this result is justified.

If the Creditor and the inducer are competitors, and as long as the contract between Creditor and Debtor is valid, especially with regard to antitrust law, the opinions of the different courts are more or less the same, with the exception noted above of Switzerland. That is, "special circumstances" are not required. The third person's interest is obviously less important than the interest of the Creditor. The specific situation or relationship between competitors in and of itself demands a strong protection from abuse of one's position that could easily lead to elimination of the competition. In the author's opinion, it is well justified to apply a stringent standard to the third person's conduct.

Where, as in the Federal Republic of Germany and in Switzerland, the classification of the inducer's conduct as *contra bonos mores* is based on "special circumstances," inducing breach of contract has no independent significance. Thus, the interest of the third person in freedom of action is no more limited than in other cases of human conduct considered *contra bonos mores*.

The courts in the United States do not focus on "special circumstances," in contrast to France, even in cases of multiple sales of real estate. The great number and especially the *nature* of privileges recognized in American law as defenses to liability of the inducer lessen the drastic impact on the third person's freedom to enter into contracts and on his right of free action. One may say that inducing breach of contract is unlawful as far as "special circumstances" or "situations" (and there are a great number of these) do not justify the inducer's conduct. Under this standard, the *effect* of the solution in the United States does not differ much from the effect of the solutions in Germany and Switzerland, even though the *approach* is quite different.